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No. 80-1681

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
Appellant,

VS.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COMMUNITY ACTION AGAINST DRUG ABUSE IN SUPPORT OF APPELLANT AND BRIEF AMICUS CURIAE OF COMMUNITY ACTION AGAINST DRUG ABUSE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
Interest of amicus	5
Opinions below	5
Statement of the case	6
Summary of argument	7
Argument	8
The ordinance is sufficiently specific to provide fair warning and notice of standards of illegal conduct	8
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases

Page

Danovitz v. United States, 281 U.S. 389 (1930) 16, 17
Grayned v. City of Rockford, 408 U.S. 104 (1972) 8, 9
Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925) 15, 16
McGowan v. State of Maryland, 366 U.S. 420 (1961) 14
United States v. Balint, 258 U.S. 250 (1922) 12, 13
United States v. Freed, 401 U.S. 601 (1971) 12, 13, 14
United States v. Greer, 588 F.2d 1151 (6th Cir. 1978) 13
United States v. McCauley, 601 F.2d 336 (8th Cir. 1979) 13
United States v. Powell, 423 U.S. 87 (1975) 12

Constitution

United States Constitution:
Article 1, Section 8, Clause 3 6
Article 1, Section 10 6
First Amendment 6, 8, 12
Fourth Amendment 6
Fifth Amendment 6, 8
Eighth Amendment 6
Tenth Amendment 6, 7
Fourteenth Amendment 6, 8
Fourteenth Amendment, Due Protection Clause 6

Ordinance

Village of Hoffman Estates (Illinois), City Ordinance No. 969-1978 "Providing for Regulatjon of Items Designed or Marketed for Use with Illegal Cannabis or Drugs" (February 20, 1978): 6, 13, 16, 17, 19, 20
Section 8-7-16A 6, 7, 9
Section 8-7-16C 6

Table of Authorities Cited

Rule

	Page
United States Supreme Court Rules, Rule No. 36	1

Statute

National Firearms Act, 26 U.S.C. Sections 5801, et seq.:	7, 11, 12, 13, 18
Section 5686(a)	16
Section 5845(b)	11
Section 5845(f)	11

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF COMMUNITY ACTION AGAINST DRUG ABUSE IN SUPPORT OF APPELLANT

Pursuant to Supreme Court Rule No. 36, Community Action Against Drug Abuse respectfully moves this Court for leave to file the annexed brief amicus curiae. Appellant Village of Hoffman Estates has consented to the filing of this brief and such consent has been lodged with the Clerk of this Court. Consent has been withheld by appellee The Flipside, Hoffman Estates, Inc.

Community Action Against Drug Abuse is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of combating drug abuse. Community Action Against Drug Abuse has 8,000 individual members including parents, teachers, school administrators, school counselors, drug abuse counselors, and medical personnel who treat persons suffering from drug abuse problems. Organizational members of Community Action Against Drug Abuse include the Sacramento City School District, Board of Education; the Black Educators for Action; the Chinese-American Citizens Alliance; the Japanese-American Citizens League; the Association of Mexican-American Educators of Sacramento; the Sacramento Suburban Kiwanis Club; the California Third District PTA; the Sacramento Council PTA; the Sacramento City Teachers Association; the YMCA; the Sacramento-Nevada District United Methodist Church; the Carmichael Presbyterian Church; the Glen Oaks Swim and Tennis Club; the Pony Express District Boy Scouts; the Carmichael Optimist Club; and the Sacramento Metropolitan Chamber of Commerce.

All of the individual and organizational members of Community Action Against Drug Abuse are vitally interested in, and directly affected by, the serious physical and psychological damage to the youth of the community which is caused by the illegal use of controlled substances. Moreover, these individuals are equally interested in and affected by the impairment of educational achievement by the youth of this community caused by drug abuse and related problems.

The members of Community Action Against Drug Abuse also have a resolute interest in eliminating the open display and sale of drug paraphernalia because such display and sale:

1. undermine youth drug education programs;

2. increase the incidences of drug abuse by glamorizing and making socially acceptable the use of illegal drugs;

3. cause disrespect for the law by encouraging the disregard for existing laws banning the use and sale of controlled substances; and

4. create additional obstacles for parents attempting to prevent or resolve drug-related problems within their own families.

Community Action Against Drug Abuse is participating as amicus curiae in litigation in California supporting a Sacramento County ordinance which bans the distribution and display of drug paraphernalia. *United States Poster Stores, Inc. v. Duane Lowe, Sheriff of Sacramento County,* Civ. No. 289820, Sacramento County Superior Court (1980). Both the Sacramento County ordinance and pending state legislation banning drug paraphernalia were sponsored by individual members of Community Action Against Drug Abuse.

Because this Court's determination in the instant case could affect the validity of the state and local drug paraphernalia laws which Community Action Against Drug

Abuse or its members have sponsored, it is requested that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus curiae is set forth in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinion of the Court of Appeals is reported below as *The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, et al.*, 639 F.2d 373 (7th Cir. 1981). The opinion of the District Court, similarly entitled, is reported at 485 F. Supp. 400 (N.D. Ill. 1980).

STATEMENT OF THE CASE

On February 20, 1978, the Village of Hoffman Estates, Illinois (Village), enacted Ordinance No. 969-1978 "Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs" (Ordinance). Section 8-7-16A of the Ordinance provides:

> "It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor."

Section 8-7-16C of the Ordinance provides:

> "It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age."

After adoption of the Ordinance, the Village attorney made available "license guidelines" which defined certain terms relevant to the Ordinance. The Ordinance took effect May 1, 1978. Plaintiff filed this suit on May 30, 1978, alleging that the Ordinance violated the First, Fourth, Fifth, Eighth, and Fourteenth Amendments; Article I, Section 8, Clause 3; and Article I, Section 10 of the United States Constitution. The District Court, after denying preliminary relief and after trial, awarded judgment to the Village on February 11, 1980. Plaintiff appealed on several constitutional grounds alleging that the Ordinance is impermissibly vague, in violation of the Due Process Clause of the Fourteenth Amendment, and violates the First Amendment and the Equal Protection Clause of the Four-

teenth Amendment. The Court of Appeals found the Ordinance to be impermissibly vague on its face, declining to rule on the other grounds, and reversed the District Court. This Court noted probable jurisdiction on June 1, 1981.

SUMMARY OF ARGUMENT

The Court of Appeals erred in finding that the phrase "designed and marketed for use" with illegal drugs was impermissibly vague. The court was particularly concerned with the term "designed." "Designed" has a clear dictionary meaning as "devised for a specific function." The concept of "designed for use" as used in the National Firearms Act has been upheld against vagueness challenges, even though the Act does not require scienter and has criminal penalties. The Court of Appeals wrongly rejected the standard that business people of ordinary intelligence are able to understand exceptions in laws regulating their businesses, particularly when the District Court had found that plaintiff had retailed items which are drug paraphernalia for three years prior to the effective date of the Ordinance and that when the Ordinance took effect, plaintiff unerringly removed all items of paraphernalia from its shelves.

Courts should not confuse protection of differing "lifestyles" and "political views" with license to disregard society's regulation of inherently dangerous objects. There is no conceivable constitutional right to sell items which facilitate and encourage the use of illegal drugs.

ARGUMENT

THE ORDINANCE IS SUFFICIENTLY SPECIFIC TO PROVIDE FAIR WARNING AND NOTICE OF STANDARDS OF ILLEGAL CONDUCT

The Court of Appeals held that the Ordinance denies due process of law under the Fifth and Fourteenth Amendments to the United States Constitution in that the Ordinance is impermissibly vague on its face. *Flipside*, 639 F.2d at 386. It is interesting that this holding relied chiefly on the case of *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

In *Grayned*, a group of black students was convicted of violating both an antipicketing ordinance and an antinoise ordinance after a demonstration for equal rights near their high school. While the conviction under the antipicketing ordinance was overturned as a denial of equal protection, the conviction pursuant to the antinoise ordinance was upheld against charges of vagueness and overbreadth. The antinoise ordinance read, in pertinent part:

> "'[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof.'" *Id.* at 107-08.

Although recognizing the impact of the ordinance on First Amendment rights of freedom of speech, the Court found that the vagueness of the term "noise or diversion" was dispelled by the ordinance's requirements that: (1) the noise or diversion be actually incompatible with nor-

mal school activity; (2) there be a demonstrated causality between the disruption that occurs and the noise and diversion; and (3) the act be "willfully done." *Id.* at 113-14.

By comparison, the drug paraphernalia ordinance is much more specific in limiting the regulated equipment to that designed or marketed for use with illegal cannibis or drugs as defined by Illinois Revised Statutes. Ordinance, Section 8-7-16A; *Flipside*, 639 F.2d at 378. The Ordinance is further made specific by publication of license guidelines which further define items included under the term drug paraphernalia. *Id.* at 379. As in *Grayned*, the incompatibility and the demonstrated causality appear within this definition of drug paraphernalia through specifying the nexus of "designed or marketed for use" with drugs made illegal by state law. In affirming the conviction in *Grayned*, the Court said:

> "As always, enforcement requires the exercise of some degree of police judgment, but as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. '[T]he ordinance defines boundaries sufficiently distinct' for citizens, policemen, juries, and appellate judges. [Footnote omitted.] It is not impermissibly vague." *Id.* at 114.

Here, the Board of Trustees of the Village of Hoffman Estates made the basic policy choice to regulate drug paraphernalia and to prohibit entirely the sale or distribution of drug paraphernalia to minors. The issue is whether the Ordinance used for this purpose has given fair warning as to what is prohibited.

As the Court of Appeals recognized, the key phrase in the Ordinance is that referencing paraphernalia "*'which is designed or marketed for use with illegal cannabis or drugs.'*" *Flipside*, 639 F.2d at 380 (emphasis in original). The court stated:

> "'It is unclear what is meant by an instrument "designed" for drug use. The term "designed" could signify only devices that have no use or function other than as a means to ingest a controlled substance. Alternatively, "designed" could include any devices that have a legitimate function but could be used for ingestion of drugs. That is, the term "designed" could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition "designed for drug use" gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.'" *Id.*

This statement, the crux of the Court of Appeals' holding, ignores the simple device, available to anyone, of going to the dictionary to see what the word "designed" means and governing one's conduct accordingly. Webster's Third New International Dictionary (1971) defines the verb "design" as "to devise or propose for a specific function" and "to plan or produce with special intentional adaptation to a specific end."

Black's Law Dictionary (1968) defines the term "designed" as "[c]ontrived or taken to be employed for a particular purpose."

It is thus readily apparent that ordinary devices which are produced for such uses as paper clips, tie bars, hand mirrors, and aluminum foil normally have, *i.e.*, to fasten papers and ties, admire one's countenance, or roast fowl, are not designed for use with illegal drugs and are not within the scope of the Ordinance. On the other hand, as in the present case, where Flipside's display items included "a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color" (*Flipside*, 485 F. Supp. at 403), one would have to be most naive not to be aware that said mirror was devised for the specific purpose of laying out one's lines of cocaine, *i.e.*, designed for use with illegal drugs.

The term "designed" is no mere local aberration. It is used, for example, in the National Firearms Act, 26 U.S.C. §§ 5801, *et seq.*, dealing with registration and taxation of certain dangerous weapons. That Act defines a machine gun as any weapon which

> "*is designed* to shoot . . . automatically more than one shot . . . by a single function of the trigger. The term shall also include . . . any combination of parts *designed* and intended *for use* in converting a weapon into a machine gun." 26 U.S.C. § 5845(b) (emphasis added).

The National Firearms Act also covers

> "any combination of parts either *designed* or intended *for use* in converting any device into a destructive device as defined . . . . The term 'destructive device' shall not include any device which is neither *designed* nor redesigned *for use* as a weapon." 26 U.S.C. § 5845(f) (emphasis added).

In *United States v. McCauley*, 601 F.2d 336 (8th Cir. 1979), the court upheld the National Firearms Act against a vagueness challenge. The defendant took issue with his conviction of possession of an unregistered machine gun. He alleged that the Act's definition of machine gun as a weapon *designed* to shoot automatically more than one shot by a single function of the trigger did not give fair warning of what was required or proscribed or provide a sufficiently definitive standard for nonarbitrary application by the jury and also permitted a conviction without scienter for an innocent act. The factual basis of McCauley's defense was that the gun in question would not fire automatically because it lacked an irreplaceable part, a magazine. *Id.* at 339-40. The court, relying on *United States v. Powell*, 423 U.S. 87, 92 (1975), held that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand and found that the defendant did not possess the machine gun merely as a curio. As to scienter, the court relied on *United States v. Freed*, 401 U.S. 601 (1971), in which this Court rejected a blanket attack on the National Firearms Act. This Court characterized the Act as "a regulatory measure in the interest of the public safety" (*id.* at 609), and concluded that the highly dangerous character of the regulated matter justified a finding of liability under the Act without a specific finding of criminal intent. *Id.*

The Court in *Freed* (*id.* at 609-10) quoted from *United States v. Balint*, 258 U.S. 250 (1922), in which the defendant was convicted of sale of narcotics over his defense that he did not know the drug was covered by a federal act:

> "It is very evident from a reading of it that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the government, and that it merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and, if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided." *Id.* at 253-54.

The holdings in *Freed* and *Balint* overrule the Court of Appeals' holding that the perceived vagueness of the Ordinance is intensified by the fact that the manufacturer, not the retailer, designs the items sold and it is thus the design intent of the manufacturer, not the retailer, which triggers the retailer's duty under the Ordinance. The Court of Appeals suggested there would be little question of invalidity were this a criminal ordinance. *Flipside,* 639 F.2d at 381 n.18. However, in *United States v. Greer,* 588 F.2d 1151 (6th Cir. 1978), the court found that the National Firearms Act was concerned with clearly identifiable weapons which were the cause of increasing violent crime and which had no lawful uses. Under these circumstances,

> " 'the intent of the user of these weapons was irrelevant, as they were so prone to abuse that they were considered *per se* dangerous and unnecessary for legitimate pursuits.' " *Id.* at 1156 (emphasis in original).

The same reasoning should be applied to these weapons of drug abuse in the violent war being waged upon our society by the illegal drug industry.

The Ordinance here at issue is also a regulatory measure in the interest of the public safety. The national epidemic of illegal drugs requires strong measures to prevent the facilitation and glamorization of drug abuse. Here, as in *Freed*, the highly dangerous character of the regulated matter, when used for its designed purpose, justifies transference of the design intent of drug paraphernalia from the manufacturer to the merchandiser.

The Court of Appeals' concern that some drug related design might be foisted off by the manufacturer upon some unsuspecting retailer, thereby requiring him to obtain a license (639 F.2d at 381), is naive beyond words. The court rejected the standard set forth in *McGowan v. Maryland*, 366 U.S. 420, 428 (1961), that business people of ordinary intelligence are able to know what exceptions are encompassed in a statute regulating their business either as a matter of ordinary commercial knowledge or by simply making an investigation. The Court of Appeals held that to apply the *McGowan* analysis here would presuppose that the retailers are engaged in the business of selling items "'designed or marketed for use with illegal cannabis or drugs.'" *Flipside*, 639 F.2d at 383.

To make this statement, the Court of Appeals had to ignore the relevant findings by the trier of fact. The District Court found that for more than three years prior to the effective date of the Ordinance, the Flipside had sold various items such as the aforementioned mirror with the

word "Cocaine" painted in purple on the surface, literature that included "Marijuana Grower's Guide" and "A Child's Garden of Grass," and the bible of the drug, and particularly drug paraphernalia, industry, the magazine "High Times." *Flipside,* 485 F. Supp. at 403.

The District Court further found:

> "Proof that these conclusions [that the Ordinance was not vague] are valid is best shown by the conduct of those who acted on plaintiff's behalf. As soon as they were advised that the subject ordinance was in force, they unerringly went to the shelves in plaintiff's store and removed all items they thought fell within the ban of the new law, a total of 72. The court has examined each; they are described in the record of this case. Their removal from the shelves of plaintiff's store successfully placed it in compliance with the ordinance. Defendants concede that plaintiff no longer is selling any 'items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes . . .'. Obviously, plaintiff was not hampered by any vagueness in the words of the subject ordinance." *Id.* at 407.

Obviously, neither was the defendant nor the District Court. The District Court was fully aware that Flipside, being in the paraphernalia business, knew exactly what paraphernalia was.

In *Hygrade Provision Co. v. Sherman,* 266 U.S. 497 (1925), the Court rejected an allegation that the word "kosher" was so indefinite and uncertain as to cause a law prohibiting sale of falsely labeled "kosher" meats to be

unconstitutional. The Court concluded that the term "kosher"

> "has a meaning well enough defined to enable one engaged in the trade to apply it." *Id.* at 502.

Similarly, those engaged in this trade of drug paraphernalia must be deemed to be fully aware of the meaning of the term drug paraphernalia and be able to conform their conduct accordingly.

In this regard, the Ordinance is analogous to statutes such as the federal moonshine paraphernalia provision in the Internal Revenue laws, 26 U.S.C. § 5686(a), which provides, in pertinent part:

> "It shall be unlawful to have or possess *any* . . . *property intended for use* in violating any provision [of the Internal Revenue laws and regulations relating to liquor] . . . or which has been so used, and every person so having or possessing or using such . . . property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both." (Emphasis added.)

Over the past 60 years, this moonshine paraphernalia statute has been applied to all kinds of objects having otherwise legal uses. In *Danovitz v. United States,* 281 U.S. 389 (1930), Justice Holmes addressed the question whether containers, corks, labels, cartons, and other "legitimate" objects could be seized under the Internal Revenue laws.

> "We are of the opinion . . . that if the empty containers and the other objects seized were offered for

> sale in such a mode as purposely to attract purchasers who wanted them for the unlawful manufacture, as we interpret the word, they were *designed* for that manufacture and could be seized." *Id.* at 397 (emphasis added).

Thus, even though the moonshine law is more broadly worded than the Ordinance at issue, this Court had no difficulty in upholding the seizure of otherwise innocent items when those items were offered for sale in such a mode as purposely to attract purchasers who wanted said items for unlawful purposes. The *Danovitz* opinion thus parallels the designed or marketed provisions of the Ordinance which similarly regulates paraphernalia offered for sale in a manner purposely intended to attract purchasers who want the items for unlawful purposes.

Because the law is so clear on the issue of providing fair warning, amicus is concerned that other issues may have influenced the Court of Appeals' ruling. That court noted its difficulty of determining what is drug paraphernalia.

> " 'when something as innocuous and susceptible of legal or merely decorative use as a "marijuana pipe" is involved. Whether selling this merchandise falls within the ordinance's prohibition is a debatable question, *particularly when conflicting lifestyles and political views suffuse the decision maker's perception of what buyers will do with the product.*'
>
> "We find that there does exist a genuine danger that enforcement of this ordinance will be used to harass

> individuals choosing lifestyles and views different from those of the majority culture." *Flipside,* 639 F.2d at 383-84 (emphasis added by Court of Appeals).

The Court of Appeals needs to be reminded that certain life-styles "different from those of the majority culture" are not protected—they are outlawed. Life-styles, such as those of gangsters and terrorists, may indeed feel harassed by the restrictions of the National Firearms Act with its limitations on distribution of machine guns and destructive devices. And such life-styles also include those of dealers in illegal drugs or their paraphernalia who may have their activities restricted by the state in order to protect the health and safety of the "majority culture."

Courts that shrug off the all-out assault by the multi-billion dollar illegal drug industry upon this nation, and particularly its youth, as merely a difference of life-style or political views are terribly mistaken. Illegal drugs are precisely that—illegal. Condoning their use through euphemisms such as "political views" or "life-styles" signals to the public that laws prohibiting their use need not be obeyed. Civilized society exists on the basis of public acceptance of and respect for duly enacted laws; whether an individual agrees with a law, he must obey it until it is changed. He may speak against the law, he may in any other reasonable way seek to change the law, but he must obey the law until it is changed by lawful authority.

The Court of Appeals struck another discordant note in its observance that

> "[t]he lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive

> persons of constitutional rights." *Flipside,* 639 F.2d at 378.

This statement is best rebutted by the District Court which had already found that

> "there is no conceivable colorable claim of a fundamental constitutional right to sell items which facilitate and encourage the use of illegal drugs." *Flipside,* 485 F. Supp. at 410.

Suffice it to say that amicus believes wholeheartedly that the view of the District Court is the correct one as to this and every other aspect of the case.

CONCLUSION

The thrust of the Ordinance at issue is not complex. It purports to regulate items "designed or marketed for use" with illegal drugs as defined by state law. There is nothing vague about this standard. If the retailer chooses to stock an item manufactured for use with illegal drugs, he brings himself within the scope of the Ordinance. If he chooses to market an item of otherwise innocent design in such a manner as to suggest that it be used with illegal drugs, he brings himself within the scope of the Ordinance. That is readily understandable to businessmen of ordinary intelligence and certainly to those in the drug paraphernalia trade.

It is well within the health, safety, and welfare powers of local government to regulate and indeed prohibit the sale of items which in the words of the District Court "facilitate and encourage the use of illegal drugs." Amicus

Community Action Against Drug Abuse therefore urges this Court to reverse the decision of the Court of Appeals and find that the Ordinance provides fair notice of its coverage for any person who wishes to abide by it.

Respectfully submitted,

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